



Holding Back the Tide

As counterfeiting continues to provide a high-gain, low-risk reward to criminals, IP owners and lawyers alike struggle to stop the tide of fake goods. **Gregory Glass** reports.

Despite the best efforts of intellectual property owners, lawyers and regional governments, counterfeiters continue to flourish in parts of Asia.

"People are fascinated with brands and trade names and want these branded products for the cheapest possible amount, especially in many Asian countries," says Lucy Rana, senior associate advocate at SS Rana & Co in New Delhi.

hard to ever stamp out. "One reason why counterfeiting has not been exterminated may be that vendors believe the potential profits of selling counterfeits outweigh the risks of liability," says Andy Leck, head of the intellectual property practice at Baker & McKenzie.Wong & Leow in Singapore. "For as long as there is a demand for counterfeit goods, there will always be vendors willing to brave the potential penalties to make a quick profit, especially where the margins are high whilst the potential penalties are low compared to other forms of illegal activities, such as the distribution of illegal drugs."

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As long as there are benefits from ripping off genuine products by selling fake goods, there will always be counterfeit goods in the market.

- *Wiramrudee (Pink) Mokkhavesa, attorney at law, Tilleke & Gibbins, Bangkok*

Qin Wen, a partner at Run Ming Law Office in Beijing, sees exactly this calculus on display in China: "There is a huge profit for selling counterfeit goods, while the punishment for such is comparatively low," he says. "At the same time, vendors and markets are two separate parties, and the markets as a landlord in most cases are not responsible for the illegal activities committed by the vendors."

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In Thailand, says Daniel Q Greif, head of the intellectual property practice at Siam Premier International in Bangkok,

Couple demand with potentially high-gain, low-risk monetary rewards for counterfeiters, and you've got a market that will be

IP owners face a particular challenge as local authorities sometimes are paid protection money to allow the activities to

take place. "To conduct successful raids, we have to convince more senior level authorities to assist with the raids," says Greif. "[At any rate,] the fines aren't large, and thus the counterfeiters can pay the fines and begin their activities once again."

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Philippine law requires officers to lodge the appropriate criminal complaint within 12 to 36 hours. Failure to do so will render such officer criminally liable for arbitrary detention.

- Pericles Casuela, partner,

Betita Cabilao Casuela Sarmiento, Manila

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together," she says. "They simply copy other people's works or expression of ideas. Counterfeiters can therefore reap huge profits by selling fake products."

Mokkhavesa notes that in Thailand, the penalty for trademark infringement is quite severe, at least on paper. "But in practice, the sanctions from court judgments are sometimes quite low. For example, in a case where about 10 items of fake goods are seized, a typical sentence for the infringer would be a fine of only THB4,000 (US\$132), which is then normally reduced by half to just THB2,000. When faced with fines of just US\$66 compared with the profit that can be gained from selling fake products, there is no doubt why infringers continue their illegal actions and are undeterred by the current penalties," she says.

Wiramudee (Pink) Mokkhavesa, an attorney at law in the Bangkok office of Tilleke & Gibbins, says that "as long as there are benefits from ripping off genuine, high-quality products by

deficiencies in the law and their enforcement, says Pericles Casuela, a partner at Betita Cabilao Casuela Sarmiento in Manila. In the Philippines, counterfeiters are invariably not arrested at

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raids, prompting them to continue their business if not open new stores at different locations, he says.

"While a law enforcement officer may technically arrest persons committing an offense in his presence, such arrest does not typically occur in practice because of legal limits on the period for police custody, which officers find difficult to comply with and instead choose to avoid," Casuela says. "Philippine

law requires law enforcement officers to lodge the appropriate criminal complaint within 12 to 36 hours from arrest, depending on the offense involved. Failure to do so will render such officer criminally liable for arbitrary detention. In cases where counterfeiters are arrested, the protracted length and high cost of litigation usually discourage IP owners from moving forward with criminal prosecution, which in turn motivates the counterfeiters

The Online Problem

Once upon time, brand owners only had to worry about physical stores selling fake merchandise. Those days are long gone, say IP practitioners in the region, who now must wrestle with online sellers, too.

"Once you shut down one website, it is possible for the same person to open up a dozen more the same day," says Stephen Stern, a senior partner at Corrs Chambers Westgarth in Melbourne.

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Even when we do find online counterfeiters, they often make a point of keeping few counterfeit items at the physical location at any one time.

- Daniel Greif, head of intellectual property,
Siam Premier International, Bangkok

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It is usually difficult to identify the physical locations of online counterfeiters, as they often register their domains using false addresses or utilize anonymiser services and distribute their products using mailing services without return addresses, says Andy Leck, head of the intellectual property at Baker & McKenzie. Wong & Leow in Singapore.

Daniel Q Greif, head of the intellectual property practice at Siam Premier International in Bangkok, says his firm encounters the same problem. "And, even when we do find them, online counterfeiters often make a point of keeping few counterfeit items at the physical premises at any one time, [so] there is a challenge to identify appropriate evidence that will convince the authorities to take action," he says. "However, we have developed with our investigative teams and the authorities highly sophisticated investigative techniques that allow us to successfully identify physical locations and to generate enough evidence to get the authorities to take action."

Pericles Casuela, a partner at Betita Cabilao Casuela Sarmiento in Manila, says the problem is similar in the Philippines. The use of pseudonyms online makes it almost impossible to identify the real culprits, he says. "Although IP owners may avail of take

down mechanisms, this functions, at most, only as a palliative measure, leaving infringers free to open new accounts under new names in order to operate."

In the Philippines, he notes, there is no legal obligation for ISPs to disclose the identities of the domain name registrants engaged in online sale of counterfeits.

Lucy Rana, a senior associate advocate at SS Rana & Co in New Delhi, says that consumers are not the only ones being ripped off by online sellers of fake merchandise. "The internet allows counterfeiters to gain anonymity, making it extremely feasible for them to dupe consumers into believing that they are buying genuine products," she says. "But not only customers, but retailers and wholesalers are also more prone to unintentionally purchasing counterfeits from anywhere in the world" through the internet, she says.

In Thailand, there is no specific law allowing brand owners to shut down websites offering fake products for sale, says Wiramrudee (Pink) Mookhavesa, an attorney-at-law in the Bangkok office of Tilleke & Gibbins. "In order to take action against such a website, we would need to find the source or physical markets, and this type of investigation is becoming increasingly difficult. In addition, most of the time, the source or physical markets do not stock large amounts of counterfeit goods, and it would not be worthwhile for IP owners to take actions against them."

In Australia, Stern says, most online sales of fake merchandise falls outside the purview of the law. "Websites generally sell to individuals who end up making purchases for their own personal use of products that are imported from overseas," Stern says. "The actual importations by the purchasers of counterfeit products are not illegal, as the importations are not considered to be uses of trademarks in the course of trade."

But perhaps the main challenge facing IP owners and lawyers in Australia is the same problem facing IP owners and lawyers everywhere: the law struggles to keep up with the criminals, who are able to move much more nimbly. "Australian law is about a decade or more behind the modus operandi of counterfeiters, who can adapt from one day to the next to changing legislation, to changing market conditions, to adopting new technology and the like," Stern says.

- Gregory Glass

to proliferate.”

Even though a country has robust IP laws, it doesn't mean they work. “Despite enacting the full scope of IP legislation and

obviously takes time, but the lack of proactive governmental action in this area is further delaying this societal norm from taking hold. In the meantime, many Indonesians are limited by monetary considerations from buying the genuine article and instead opt for counterfeit products, which are widely available. Until meaningful action is consistently taken by those responsible, this cycle will continue.”

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Where the importer refused to forfeit the goods, IP rights holders were generally left with the choice of commencing court proceedings or taking no further action.

- Lisa Ritson, partner,
Ashurst, Sydney

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Enforcement problems exist even in countries where you would least expect them, such as Australia, says Stephen Stern, a senior partner at Corrs Chambers Westgarth in Melbourne. “Under Australian law, it has until the recent changes in our Trade Marks Act 1995, which come into force on April 15, 2013, been extremely difficult to obtain sufficient damages against a market trader to act as a disincentive to their ongoing conduct,” he says. “One has to prove the extent of sales of counterfeit articles to be able to quantify damages,

making numerous revisions to those statutes, this has done little to create a culture of respect in Indonesia for intellectual property rights,” says Prudence Jahja, an associate at Januar Jahja & Partners in Jakarta. “Developing such a pro-protection culture

which naturally is extremely difficult if not impossible to do where such traders do not keep records. Some courts will be prepared to order a sum of damages that is a judicial estimate, but other courts will not.”

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Spotting the Fakes

Asia IP asked intellectual property lawyers from around the region how they spot fake goods:

"The low price of particular goods is usually a giveaway that they are counterfeit. Secondly, the places or even websites from which some brands are sold immediately announce that the products are counterfeits."

- Stephen Stern, senior partner
Corrs Chambers Westgarth, Melbourne

"It is usually the sales staff of the IP right holder who are familiar with the products and markets who spot the fakes."

- Qin Wen, partner
Run Ming Law Office, Beijing

"The usual method employed by private investigators is to conduct market surveys in various markets and establishments, noting visual cues of the products including security features and pricing. Investigators normally purchase samples of suspected counterfeits, which are then passed on to the IP owners for confirmation of their counterfeit character."

- Pericles Casuela, partner
Betita Cabilao Casuela Sarmiento, Manila

"Price is one indicator that may be helpful in certain instances. But price difference alone is sometimes inconclusive because it may be due to a parallel importation of the goods from a country where the goods are sold at a lower price. Some marks also have special characteristics that infringers have not been able to replicate, so it is easier to spot fakes when it comes to this category. One particularly successful method of identification has been implemented by the music industry with major labels requiring their manufacturers of CDs to voluntarily engrave mould codes on their presses so that legitimate discs can easily be traced to the source manufacturer based on a unique mould code engraved onto the CD. Some counterfeiters have thus resorted to obliterating the mould codes, although this then becomes a clear tell tale sign of the counterfeit nature of such products."

- Andy Leck, head of intellectual property
Baker & McKenzie.Wong & Leow, Singapore

Stern says the amendments to the legislation will give courts the power to order additional damages to act as, among other things, a disincentive to infringers, which he says may make it

supporting criminal prosecutions to act as a real deterrent," he says.

Finally, Stern says, actions against market landlords themselves are not easy to run in Australia. "The only action to date taken in Australia seeking to make a market landlord liable for the infringing conduct of stall holders was unsuccessful, even though it did seem to encourage many dozens of market landlords to co-operate with the brand owners in the future," he says.

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It can be both costly and time-consuming for IP owners to recapture their marks in Indonesia, as civil litigation will almost certainly be necessary.

- Andrew Diamond, foreign legal consultant,
Januar Jahja & Partners, Jakarta

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Rana notes that advances in technology have made it easier for counterfeiters to ship goods to other countries. "Counterfeiters have adopted strategies which make it easier to produce and bring in the counterfeit product, such as shipment of products for final assembly and distribution, thereby minimizing the risk of seizures in the countries where components are produced," she says.

somewhat easier to shut down particular vendors. "The police cannot devote adequate time to carrying out enough raids and

goods everywhere in the region, Leck points out. "Counterfeit goods are no longer easily available for purchase in Singapore

on the streets, so enforcement efforts can be effective, even if not 100% so.”

Taking Steps

If you've never devised an IP protection strategy in Asia, it's important to realize that there is no "in Asia" and that often strategies – and challenges – vary from country to country. "Some

problems are common to all countries while other problems are more pronounced in certain countries," says Leck. "One common issue is the key people behind a counterfeiting operation, particularly sophisticated ones, are very good at covering their tracks. Sometimes, the ultimate recipient of the goods might be in a different country, and the only person in jurisdiction may be a middleman or the end retailer who has no clear idea of the primary source of the counterfeit products. Often the only way around such problems is to work with investigators who have established networks of informants and contacts and to be persistent in devising alternative avenues of investigation when one avenue fails to bear fruit.

In the Philippines, Casuela says he frequently encounters the use of local citizens as "dummies" for business registration to conceal the identities of the actual business owners who are foreign nationals.

"Philippine ownership restrictions on retail trade prompt these foreign nationals to use dummies to obtain business registration papers in order to operate locally," he says. "These foreign

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- Stephen Stern, partner,

Corrs Chambers Westgarth, Melbourne

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nationals also give false identification to evade prosecution. A possible workaround to this problem is to conduct enforcement

retailers are more out in the open in public markets. However, brand owners highly prefer to shut down manufacturers, as this stops the counterfeiting activity at the source and slows sales to numerous retailers. Thus, we focus our activities on going for the 'big fish' manufacturers – and, this strategy has proven successful and is appreciated by our clients.”

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Trademark awareness is an effective measure that can be used to protect and suppress the demand for counterfeit goods.

- Lucy Rana, senior associate advocate,
SS Rana & Co, New Delhi

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actions in coordination with immigration authorities so that these foreign nationals, who are most of the time undocumented aliens, are immediately taken into custody.”

Manufacturers are more difficult to shut down than distributors in Thailand, as often the manufacturing facilities are well-hidden in remote locations,” says Greif. “On the other hand, distributors/

Cambodia borders, as well as in famous beach locations, where we focus our activities with the Thai authorities,” he says.

China, too, finds manufacturers of fakes in rural areas, says Qin. “They usually locate in remote rural areas with the protection of the local people or even local governments [so] shut down activities will need a large enforcement force to carry it out.

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However, the larger the enforcement force involved, the more chances of the manufacturers being informed. And when the enforcement force leaves, the production resumes, anyway."

In Australia, as a preventative step, it is possible for IP owners to lodge a Notice of Objection with the Australian Customs and Border Protection Service, says Lisa Ritson, a partner in the Sydney office of Ashurst. Notices of Objection can be lodged under both the Copyright Act 1968 (Cth) and / or the Trade Marks Act 1995 (Cth). The Notices operate such that Customs may seize goods when it is considered that they appear to infringe the copyright or trademarks contained in the Notice, and that they appear to be intended for some commercial purpose, she says. "Previously, there have been some shortcomings with the Customs Notice of Objection scheme in Australia, which may result in seized goods ultimately being released into the Australian marketplace," says Elizabeth Ireland, a Sydney-based senior associate at Ashurst. "This was due to the fact that the IP owner had a short period of time in which to either secure the importer's agreement to forfeit the seized goods, or to commence proceedings for trademark or copyright infringement against the importer."

Ritson and Ireland note that under the previous system, there were often difficulties in identifying the importer and/or securing the importer's agreement to forfeit the seized goods. "Where the importer did not respond or refused to forfeit the goods, IP rights holders were generally left with the choice of either commencing court proceedings or taking no further action, which would result in the goods being released into the marketplace," says Ritson. "Commencing proceedings for trademark or copyright infringement in Australia can be a costly and time consuming exercise. These costs are often more digestible where there are large commercial quantities of goods involved but can be disproportionately high in matters where only a small number of products are involved."

However, Ritson and Ireland say, in April 2013, reforms were made to the Customs Notice of Objection scheme which improve the position of trademark owners. Among other improvements, the seized items must now be claimed by the importer, otherwise they will be automatically forfeited to Customs. "Instead of the previous 10-20 day period to seek to get the importer to voluntarily forfeit the goods, the importer is now required to claim the goods within the claim period," Ireland says.

Also, trademark owners will also be provided with further information in relation to the importers and exporters of the seized goods. This will include any additional personal information which could help identify the importer as well as any identifying information in relation to the exporter of the goods.

"Following these changes, trademark owners will have greater information provided to them, and the onus will be on the importer to actively engage in the process and claim the goods," says Ritson.

IP rights owners in Indonesia often find that local agents and distributors have registered their client's trademarks. "This is unfortunately a common and long-standing problem in Indonesia," says Andrew Diamond, a foreign legal consultant at Januar Jahja & Partners in Jakarta. "There are even cases where the distributors sue the true owners of the mark for trademark infringement once their relationship sours. In these cases, it can be both costly and time-consuming for the owners to recapture their marks in Indonesia, as civil litigation will almost certainly be necessary. It is vital that owners file (or renew) all relevant marks in Indonesia before engaging in any business activities or negotiations with local agents or distributors."

Is Anyone Really Hurt?

Consumers of counterfeit goods – those who feel the need to justify their actions, at least – remain convinced that the only parties being hurt by their purchases are those who created the original goods to begin with, and nobody is likely to concern themselves with taking money out of the pockets of Nicki Minaj, Steven Spielberg or LVMH, least of all those subsisting on the low wages prevalent in much of Asia.

But the damage caused by buying fake goods goes much deeper than merely depriving a few millionaires of payment for their work.

Thailand, Greif says, has a large tourist industry – nearly 20 million tourists visited in 2011, according to the Department of Tourism – which buys a significant number of fake products. "Many of our tourists are unaware of the horrific nature of what is behind counterfeiting: child labor, organized crime, human trafficking, money laundering, not to mention the fact that counterfeiters don't pay taxes, don't abide by labour laws and often sell dangerous and shoddy products," he says.

Consumers are adversely affected as they have to contend with inferior goods, says Casuela. "and, worse, goods that may cause physical harm, such as counterfeit medicines, food, beverages, etc."

Trademarks can be a promise of quality or safety, says Leck. "Consumers suffer when they buy goods expecting a certain level of quality, but end up getting a product that is poorly made, unsafe and unregulated. Furthermore, counterfeiting may help fund organized crime and this can have a direct impact on local welfare."

Stern notes that counterfeiters don't usually pay taxes on their sales, which hurts the local economy. "To the extent that counterfeit sales reduce sales of genuine products, that equally reduces the taxes that are paid by the brand owners (or their licensee or distributors) on lost sales. Jobs are also put at risk if distributors' or licensees' sales are threatened by the sales of counterfeit products," he says.

Rana agrees: "The counterfeits industry has serious economic and health ramifications for government, businesses and consumers," she says. "The government loses tax revenues in terms of sales tax, excise tax, income tax and customs duty. Moreover, counterfeiting affects the economy as it becomes difficult for the domestic market to establish itself, and then it brings down employment as well."

Suppressing Demand

So just what can IP owners and lawyers do to decrease demand? They can complement anti-counterfeiting actions with public awareness campaigns, say many of the lawyers who spoke to *Asia IP*. One successful effort in the recent past was the sustained campaign of an international association of software developers that offered rewards to informants, conducted frequent raids, and went around the Philippines with its lawyers for public awareness talks and seminars, says Casuela.

The general public should be made more aware of the importance of IP rights, as most infringement and counterfeiting cases in India are a result of infringers and counterfeiters being unaware of the existing marks, says Rana. "Businessmen residing in small districts or towns should be enlightened about the importance of their brand names through seminars and lectures arranged through their respective associations," she says.

"Trademark awareness is an effective measure that can be used – rather is being used in Asia, particularly India – to

protect and suppress the demand for counterfeit goods,” Rana says. “One commonly adopted measure is to circulate and issue caution notices either in the local and national newspapers or through company websites to make the target audience aware about counterfeit goods.”

In Thailand, Tilleke & Gibbins has established its Museum of Counterfeit Goods at its office in Bangkok. The museum houses a collection of more than 4,000 products that infringe trademarks, patents, and copyrights. Regular visitors to the museum include international and local media, schools, and members of the general public. Last year, nearly 2,000 people visited the museum, free of charge, to learn about IP infringement.

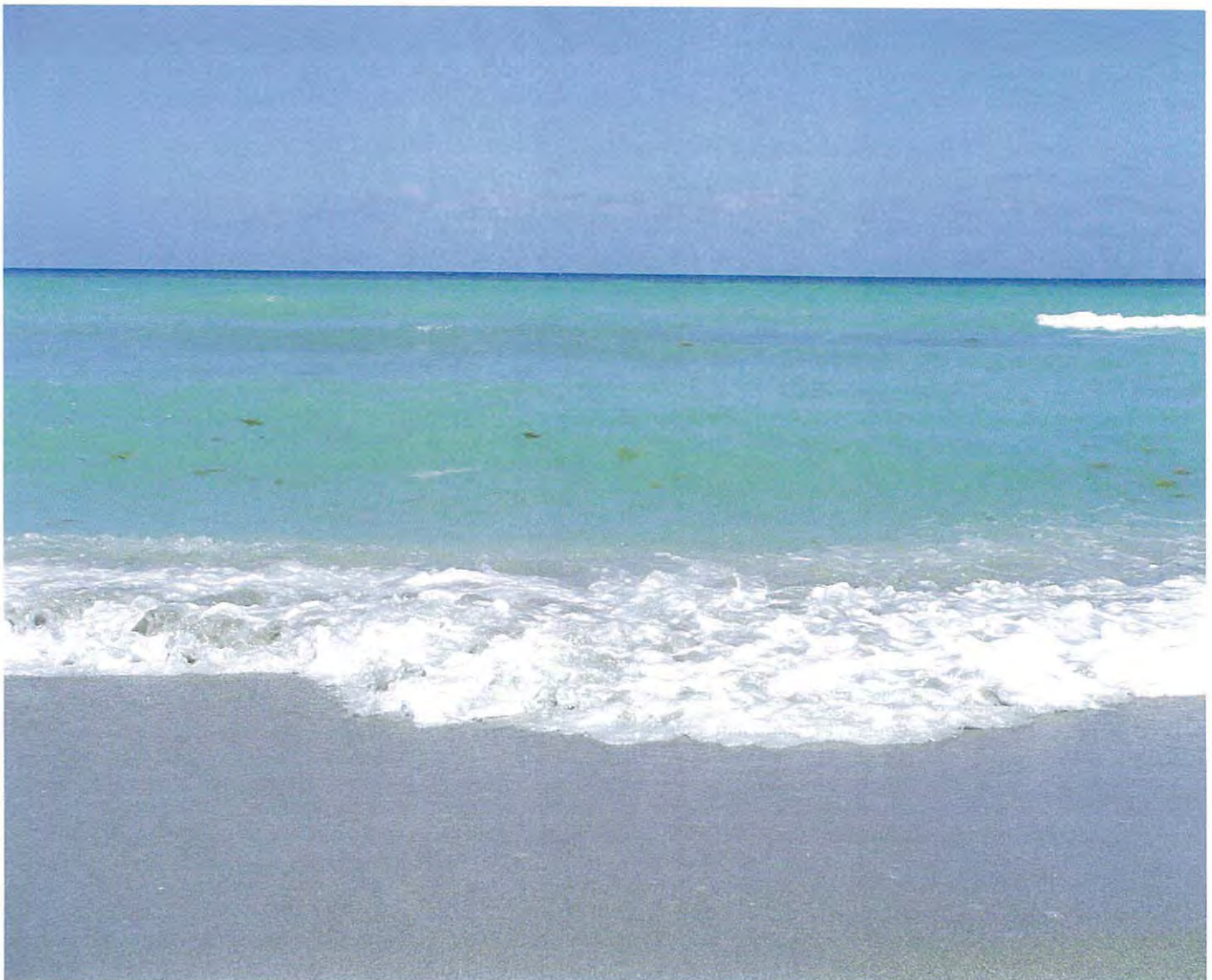
“By viewing fake goods alongside their genuine counterparts, museum visitors gain a new perspective on the extent and consequences of the counterfeiting of legitimate goods,” says Mokkhavesa. “Through this public awareness campaign, we hope to educate the public on the dangers of counterfeiting and help defend our clients’ valuable IP rights.”

Leck says it is important that IP lawyers and rights owners take regular enforcement actions to suppress the demand

for counterfeit goods. “This will help show their robust stance towards anti-counterfeiting and send a message to counterfeiters that they are vigilant,” he says.

Enforcement actions probably bear more fruit in the long term than do awareness campaigns, Leck says. “The effectiveness of awareness efforts varies. For example, the public may be receptive to awareness efforts that highlight the safety issues that counterfeit products may have, such as lead paint in toys,” he says. “On the other hand, awareness efforts to combat online piracy in Singapore do not appear to have had an appreciable effect.”

Stern says that one of the most important steps to take is to educate consumers about the dangers of counterfeit goods and to let them know where the monies often flow. “Equally, politicians and public servants who so often control the policies need to be aware of the dangers and risks posed by the sale of counterfeits as well as the beneficiaries of such sales,” he says. “It is in their hands to first introduce and then to enforce strong anti-counterfeiting laws, something that, from an Australian perspective, at least, is not happening fast enough.” **AIP**



Trying to stop the flood of fakes can seem as pointless as trying to stop the tide.